

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER THOMAS,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 00-903-SLR
)	
RICK KEARNEY, Warden, and)	
ATTORNEY GENERAL OF THE)	
STATE OF DELAWARE,)	
)	
Respondents.)	

Roger Thomas, Sussex Correctional Institution, Georgetown,
Delaware. Petitioner, pro se.

Elizabeth Roberts McFarlan, Esquire, Delaware Department of
Justice, Wilmington, Delaware. Counsel for Respondents.

MEMORANDUM OPINION

Dated: June 25, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Roger Thomas is a Delaware inmate in custody at the Sussex Correctional Institution in Georgetown, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 1) For the reasons that follow, the court concludes that petitioner's claims do not provide a basis for federal habeas relief. Accordingly, the court will deny the petition.

II. BACKGROUND

On August 3, 1998, petitioner was charged by information with four counts of unlawful sexual intercourse in the first degree, and one count each of kidnaping, assault, terroristic threats, and criminal trespass. The information alleged that on June 27, 1998, petitioner forced seventeen-year-old Shirley Smith to engage in nonconsensual vaginal and oral intercourse.¹ On April 1, 1999, petitioner appeared before the Delaware Superior Court and entered a Robinson plea² of guilty to one count of unlawful sexual intercourse in the second degree for forcing Smith to engage in oral sex. The Superior Court sentenced

¹ The information originally alleged only unlawful vaginal intercourse, but was later amended to allege forced oral intercourse.

² Pursuant to Robinson v. State, 291 A.2d 279 (Del. 1972), the Superior Court may accept a guilty plea where the defendant is unwilling to admit his guilt, if the plea is voluntary, knowing, and intelligent, and if there is a factual basis for the plea. Id. at 281.

petitioner to fifteen years in prison suspended after ten years for probation. Petitioner did not file a direct appeal to the Delaware Supreme Court.

On December 1, 1999, petitioner filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. The Superior Court denied the motion on the merits. State v. Thomas, Crim. A. No. 98-07-0071 (Del. Super. Ct. Jan. 19, 2000). The Delaware Supreme Court affirmed the denial of postconviction relief. Thomas v. State, No. 85, 2000, 2000 WL 1508800 (Del. Sept. 1, 2000).

Petitioner has now filed the current application for federal habeas corpus relief. Respondents ask the court to deny the petition because the claims presented therein either lack merit or are procedurally barred from federal habeas review.

III. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the

requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies" to satisfy exhaustion, he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is unavailable. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Lines, 208 F.3d at 160. Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a

fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lines, 208 F.3d at 160.

In order to demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably available or that government officials interfered in a manner that made compliance impracticable. Werts, 228 F.3d at 193. In addition to cause, a petitioner must establish actual prejudice, which requires him to show "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice exception applies only in extraordinary cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. To

establish actual innocence, a petitioner must prove that it is more likely than not that no reasonable juror would have convicted him. Schlup v. Delo, 513 U.S. 298, 326 (1995); Werts, 228 F.3d at 193.

B. Standards of Review

A federal court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. Williams v. Taylor, 529 U.S.

362, 412 (2000). "A federal court may not grant a writ of habeas corpus merely because it concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." Gattis v. Snyder, 278 F.3d 222, 228 (3d Cir. 2002).

Specifically, a federal court may grant the writ under the "contrary to" clause only "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. The court "must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." Werts, 228 F.3d at 197 (citing Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir. 1999)). In order to satisfy the "contrary to" clause, the petitioner must demonstrate "that Supreme Court precedent **requires** the contrary outcome." Matteo, 171 F.3d at 888 (emphasis added).

If the petitioner fails to satisfy the "contrary to" clause, the court must determine whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. Under the "unreasonable application" clause, the court "may grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that

principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. In other words, a federal court should not grant the petition under this clause "unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." Matteo, 171 F.3d at 890.

Respecting a state court's determinations of fact, a federal habeas court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Id. The presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001).

IV. DISCUSSION

In his application, petitioner articulates the following claims for relief:

- (1) Counsel rendered ineffective assistance by failing to disclose favorable DNA evidence, failing to visit the crime scene, and failing to contact witnesses.
- (2) Petitioner's guilty plea was coerced.

Respondents acknowledge that petitioner exhausted his claim that counsel failed to disclose favorable DNA evidence and his claim of a coerced guilty plea by presenting them in his postconviction proceedings. Respondents argue, however, that petitioner's claims of ineffective assistance for failing to visit the crime

scene and failing to contact witnesses are procedurally barred. The court considers petitioner's claims in turn.

A. Ineffective Assistance of Counsel

1. Counsel's Failure to Visit the Crime Scene and Contact Witnesses

As part of his claim of ineffective assistance of counsel, petitioner alleges that he asked counsel to visit the crime scene, but that counsel failed to do so. Petitioner further alleges that "there were several witnesses [counsel] never contacted" who "could have supported the facts of this matter." (D.I. 1 at 5) Inexplicably, petitioner does not describe what counsel would have discovered at the crime scene, nor does he identify specifically any witnesses or offer any proposed testimonies.

Regardless, a review of the state court record confirms that petitioner did not present either of these claims to the state courts. Neither his Rule 61 motion nor his brief on postconviction appeal mentions counsel's failure to visit the crime scene or contact any witnesses. Because petitioner did not present these claims to the state courts, the court must determine whether state procedural rules permit him to do so now. If not, federal habeas review of these claims is unavailable absent a showing of either cause and prejudice or a miscarriage of justice. Coleman, 501 U.S. at 750; Lines, 208 F.3d at 160.

According to respondents, state court review of these claims

is barred by Rule 61(i)(2):

Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(2). In Delaware, a petitioner must present each of his grounds for relief in his initial Rule 61 motion. Super. Ct. R. Crim. P. 61(b)(2); Robinson v. State, 562 A.2d 1184, 1185 (Del. 1989). Delaware courts refuse to consider any claim that was not asserted in an initial Rule 61 motion unless warranted in the interest of justice. Maxion v. State, 686 A.2d 148, 150 (Del. 1996). In order to satisfy the interest of justice exception, a petitioner must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him. Woods v. State, No. 259, 1997, 1997 WL 425492 (Del. July 18, 1997) (citing Flamer v. State, 585 A.2d 736, 746 (Del. 1990)). In the matter at hand, the record is devoid of any such subsequent legal developments. Accordingly, the court concludes that Rule 61(i)(2) clearly forecloses state court review of these two claims.

The next step of the analysis is to determine whether the court may excuse petitioner's procedural default of these claims. To this end, the court has searched petitioner's submissions in an effort to discern why he failed to present either of these claims in his postconviction proceedings. His submissions are

devoid of any such explanation. Moreover, he fails entirely to offer any facts from which the court could conclude that he suffered prejudice as a result of counsel's alleged errors. In short, petitioner has failed to demonstrate cause and prejudice for his procedural default.

Petitioner, however, does assert that he is innocent of the crime for which he was convicted. In support of this assertion, he offers the affidavit of Lawrence Turner Jr., who attests that Shirley Smith told him on July 4, 1998, that petitioner did not "rape" her. (D.I. 1, Attachment)

Unfortunately for petitioner, Turner's affidavit offers little support for his assertion that he is actually innocent. Petitioner pleaded guilty to unlawful sexual intercourse in the second degree for forcing Smith to engage in oral sex. As respondents point out, petitioner admitted to the police, in a videotaped statement, that he engaged in oral sex with Smith. In light of petitioner's confession and plea, Smith's statement that petitioner did not "rape" her falls far short of demonstrating that no reasonable juror would have convicted him of forcing her to engage in oral sex. Schlup, 513 U.S. at 326; Werts, 228 F.3d at 193. In other words, petitioner's assertion of innocence is insufficient to excuse his procedural default.

For these reasons, the court concludes that petitioner's claims that counsel rendered ineffective assistance by failing to

visit the crime scene and failing to contact witnesses are procedurally barred. Accordingly, federal habeas review of these claims is unavailable.

2. Failure to Disclose Favorable DNA Evidence

The next facet of petitioner's claim of ineffective assistance involves counsel's failure to disclose to him the results of DNA testing. According to petitioner, counsel knew that the results of the DNA tests were favorable, but failed to share these results with petitioner before he pleaded guilty. Respondents acknowledge, and correctly so, that petitioner exhausted this claim by presenting it to the state courts in his postconviction proceedings.

Because the Delaware Supreme Court rejected this claim on the merits, this court's review is limited to determining whether that court's decision either was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 412. The clearly established federal law governing claims of ineffective assistance is the familiar two-prong test of Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, a defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 686, 694. In the

context of challenging a guilty plea based on ineffective assistance, a defendant must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In rejecting petitioner's claim, the Delaware Supreme Court first recited the Strickland standard verbatim. Thomas, 2000 WL 1508800 at **1. The court then wrote:

The DNA report, which stated merely that no spermatozoa were found in the samples taken from the victim, was not exculpatory with respect to this amended charge. Moreover, the report stated that the DNA profile of blood found on the victim's pants and head was inconsistent with the DNA profile of the victim and consistent with the DNA profile of Thomas. These findings did not eliminate Thomas as the perpetrator of the crime with which he was charged. Even assuming that Thomas was not told of the results of the DNA testing by his counsel prior to entering his plea, the record reflects that, at the time Thomas entered his plea, he was aware of all facts relevant to his decision whether to enter a plea to the amended charge or proceed to trial. Thus, Thomas has failed to demonstrate error on the part of his counsel that resulted in prejudice to him.

Id. at **2. Certainly, the Delaware Supreme Court recited the correct governing legal standard as articulated in Strickland and Hill. The relevant inquiry, then, is whether the Delaware Supreme Court reasonably applied that standard to the facts of petitioner's case.

An examination of the DNA report leads the court to conclude

that the Delaware Supreme Court's decision is entirely reasonable. As the Delaware Supreme Court noted, nothing in the DNA report excludes petitioner as having attacked Smith. In particular, the DNA report indicates that the profile of blood found on Smith's clothing and head was inconsistent with her own blood profile, and was consistent with petitioner's blood profile. Respecting the DNA report's finding of no spermatozoa, the absence of spermatozoa does not prove that petitioner did not engage in forced oral sex with Smith. In the face of petitioner's videotaped admission to the police, the court cannot conclude that petitioner would not have pleaded guilty if counsel had disclosed the DNA results beforehand.

For these reasons, the court concludes that the Delaware Supreme Court's rejection of this claim is neither contrary to, nor did it involve an unreasonable application of, clearly established federal law. Accordingly, the court will deny petitioner's request for federal habeas relief as to this claim.

B. Coerced Guilty Plea

Petitioner's final claim is that his guilty plea was coerced due to the ineffective assistance of counsel in failing to disclose the DNA results. Petitioner contends that he would not have pleaded guilty if counsel had disclosed the DNA results beforehand.

For analytical purposes, this claim is indistinguishable

from petitioner's claim that counsel rendered ineffective assistance by failing to disclose the DNA results. See Hill, 474 U.S. at 59. As described above, the court cannot conclude that counsel's failure to disclose the DNA results constitutes ineffective assistance under Strickland and Hill. Because counsel did not render ineffective assistance, petitioner's claim that his guilty plea was coerced due to counsel's ineffective assistance fails. Accordingly, the court will deny petitioner's request for federal habeas relief as to this claim.

V. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As explained above, the court has concluded that the claims presented in the current petition do not provide a basis for federal habeas relief. The court is persuaded that reasonable jurists would not debate the correctness of its assessments. Petitioner, therefore, has failed to make a substantial showing

of the denial of a constitutional right, and a certificate of appealability is not warranted.

VI. CONCLUSION

For the reasons stated, the court will deny petitioner's application for a writ of habeas corpus, and will not issue a certificate of appealability. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ROGER THOMAS,)	
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Petitioner,)	
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v.)	Civil Action No. 00-903-SLR
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RICK KEARNEY, Warden, and)	
ATTORNEY GENERAL OF THE)	
STATE OF DELAWARE,)	
)	
Respondents.)	

O R D E R

At Wilmington, this 25th day of June, 2002, consistent with
the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Roger Thomas' petition for a writ of habeas
corpus pursuant to 28 U.S.C. § 2254 is dismissed, and the relief
requested therein is denied.

2. The court declines to issue a certificate of
appealability for failure to satisfy the standard set forth in 28
U.S.C. § 2253(c)(2).

Sue L. Robinson
United States District Judge